No. 81-2332.

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In the Supreme Court of the United States.

OCTOBER TERM, 1982.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,
PETITIONER,
v.
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Amicus Curiae Brief of the Boston Redevelopment Authority, a Political Subdivision of the Commonwealth of Massachusetts, in Support of the Petition for the Writ of Certiorari.

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PRELIMINARY STATEMENT

The Boston Redevelopment Authority ("BRA") respectfully submits this brief as amicus curiae in support of the petition of the Norfolk Redevelopment and Housing Authority ("NRHA") for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

This brief is submitted as a matter of right pursuant to Supreme Court Rule 36.4 since the BRA is a "public body politic and corporate" of the Commonwealth of Massachusetts (the "Commonwealth"), Mass. Gen. Laws Ann. ch. 121B, §4, (West Supp. 1981), and the issues involved in this case vitally affect redevelopment in the Commonwealth.

The BRA is charged with responsibilities very similar to those of NRHA and other housing and redevelopment authorities throughout the United States. As such, it is

responsible within the City of Boston for the acquisition, clearance and assembly of land and improvements within decadent, substandard and blighted open areas and for preventing the spread of blight and deterioration in such areas through the carrying out of urban renewal projects. Mass. Gen. Laws Ann. ch. 121B, §§1 and 4 (West Supp. 1981).

Since the passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. (1976) (the "Uniform Relocation Act"), the BRA has undertaken a number of significant urban renewal projects in conjunction with the United States Department of Housing and Urban Development ("HUD") and with federal assistance has made Boston a model for urban revitalization.

INTEREST OF THE BRA AS AMICUS CURIAE

This case raises a question of such public interest that justice requires a final

determination by the Supreme Court of the United States. The BRA asserts its right to appear as amicus curiae in order to protect the common law rule in Massachusetts, and in other states, that in return for the right to install its facilities under public streets at no charge a public utility may be required to remove its facilities at its expense. Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904); New England Telephone and Telegraph Co. v. Boston Terminal Co. 182 Mass. 397, 65 N.E. 835 (1903). This general rule is reflected in contracts with public utilities in the form of licenses granted by municipalities which by their terms require a utility to bear relocation costs. Such licenses are similar to the franchise agreement in the case at bar that provided that the public utility "was obligated, upon request of the City, to abandon or remove ...[distribution facilities] without charge." Brief for Petitioner

at 7, NRHA v. Chesapeake and Potomac Tel. Co. of Va., 674 F.2d 298 (4th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3001 (U.S. June 22, 1982) (No. 81-2332).

This common law and contractual right also was recognized by HUD prior to enactment of the Uniform Relocation Act in its manual of HUD policies whereby HUD disallowed relocation compensation to utility companies.

> Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or preexisting local ordinances or provisions of the company's franchise.

HUD Urban Renewal Handbook (RHA 7209.1). This policy has remained unchanged.

In reliance upon this long standing practice, the BRA has entered into a number of financial settlements with HUD. Under the BRA's typical federal assistance, or "loan and grant", contract with HUD, relocation

costs are to be reimbursed by HUD. HUD's obligation to reimburse such costs is generally terminated by a final settlement agreement, approximately twenty of which have been made in connection with Boston projects. In each of these projects, no relocation costs have been paid to public utilities. It can now be anticipated that the BRA as well as a number of other redevelopment authorities throughout the Commonwealth and the United States will be requested to reimburse public utilities for relocation costs that were incurred by the utilities without expectation of public compensation and therefore included in the utilities' rate bases and paid by utility customers in the form of higher utility bills. It can be anticipated that such costs will be in the millions, and perhaps, billions of dollars.

The United States Court of Appeals for the Fourth Circuit ruled that the literal

language of the Uniform Relocation Act required relocation costs to be paid to public utilities as displaced persons. This ruling, the first of its kind, abrogates over a century of established doctrine that public utilities must relocate upon request by local governing bodies without compensation and contravenes Congressional intent, as expressed in the Uniform Relocation Act and other contemporary legislation, to leave this doctrine intact. It ignores state law and the terms of specific licenses and franchises under which public utilities consent to the relocation of services without compensation as a condition for doing business in a municipality. It treats as irrelevant the long standing policy of HUD to exclude such costs from relocation benefits on which redevelopment authorities have relied for the twelve years following the passage of the Uniform Relocation Act and on which the financial

integrity of redevelopment authorities depends.

The impact of the Fourth Circuit's decision upon the financial support for the BRA and upon future projects in the City of Boston is substantial. The practical result is to create a vast, unexpected windfall for public utilities. For projects already completed, utilities will look to the BRA in the first instance for reimbursement. The effect on redevelopment authorities will be crippling since no funds have been appropriated to cover such unanticipated claims, and the magnitude of such claims will likely exhaust existing funds and threaten the continuing vitality of redevelopment authorities. Consequently, both present and past redevelopment efforts will be placed in jeopardy. In addition, should such claims be made, the very basis for final settlements with HUD will be undermined. The BRA as well

as other redevelopment authorities will, by necessity, seek reimbursement from HUD. Whether local redevelopment authorities or HUD pays, there will be significantly less money available for additional redevelopment, and the net effect will be severely to retard the revitalization of the cities of this country. Already, on the basis of the Fourth Circuit's decision, public utilities are refusing to proceed with relocation of services unless paid relocation costs.

SUMMARY OF ARGUMENT

Utility companies occupying public property free of charge are not within the class of persons intended to be protected by the Uniform Relocation Act. The language and legislative history of the Uniform Relocation Act support petitioner's position that relocation benefits were not intended to be paid to utilities. Congress enacted the Uniform Relocation Act with the federal highway and federal urban renewal programs in mind and with an intention to create a uniform system. Neither of these systems created a right to compensation under federal law for utility companies. Thus, Congress must not have intended to extend relocation compensation to utility companies under the Uniform Relocation Act.

The relationship between utility companies occupying public land free of charge and municipalities is a special contractual

one pursuant to which utility companies agree to remove or abandon their facilities without compensation. Absent a clear statement of Congressional intent to the contrary, it is improper to construe the Act as altering such established relationships without creating constitutional infirmities.

ARGUMENT

I. PUBLIC UTILITIES ARE NOT WITHIN THE CLASS OF PERSONS TO BE PROTECTED BY THE UNIFORM RELOCATION ACT.

Public utilities are not within the class of persons whom Congress sought to protect in the Uniform Relocation Act. The Act establishes:

> a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

42 U.S.C. §4621 (1976) (emphasis added).

The Uniform Relocation Act by its literal terms applies only to a person who

"moves from real property or moves his personal property from real property as a result of the acquisition of such real property" 42 U.S.C. §4601(6) (1976). The purpose of such relocation benefits is set forth in the legislative history as providing benefits for persons previously inadequately compensated by eminent domain:

> As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas with already limited housing, the result can be catastrophic for those whose houses or businesses must give way to public needs. The result has too often been that a few citizens have been called upon to bear the burden of meeting public needs.

H.R. Rep. No. 1656, 91st Cong., 2d Sess.2, reprinted in [1970], U.S. Code Cong. & Admin. News 5850, 5851.

It was therefore to fill the gap of traditional compensation under eminent domain, which compensates an owner only for the value of the taken property, United States v. 3969.59 Acres of Land, 56 F.Supp. 831 (D. Idaho 1944), that Congress provided for the additional benefits in the Uniform Relocation Act. Those benefits apply only to persons subject to eminent domain and to other persons, such as tenants, explicitly provided for by the Act. See, e.g., 42 U.S.C. §4624 (1976). Public utilities, which have no right to compensation under eminent domain by virtue of the common law rule and their contractual undertakings, can not be within the class of persons protected by the Uniform Relocation Act.

Nevertheless, the Fourth Circuit concluded that a public utility comes within the literal language of the Uniform Relocation Act because it "move[d]...personal property

from real property." This literal reading of the Act in fact involves a logical leap. Public utilities typically do not move their existing lines; rather, new service lines are installed in other locations. Thus, public utilities are entitled to compensation only under the acquisition provision of the Uniform Relocation Act, 42 U.S.C. §4652 (1976), to the extent their property is subject to principles of eminent domain. A public utility was never intended to recover for costs that it was otherwise not entitled to under an eminent domain taking.

Such a distinction is a most logical one in view of the economics of utility company operations and their relationship with cities and towns and their consumers. Most utilities, like the Chesapeake and Potomac Telephone Company of Virginia, pay nothing to cities and towns for the right to use public

streets and other property and agree to abandon or remove them without charge. Utility companies are required to offer services to the public, they enjoy the benefit of licenses or easements free of charge, and they agree to remove their facilities also without charge. Congress recognized these peculiarities and quite logically viewed utilities as not really displaced in the more common sense of, for example, an occupant of a dwelling unit or storekeeper. Such persons pay for the right to occupy and are commonly forced to relocate as a result of federal projects. Utilities do not pay for such rights and indeed usually are provided with alternative means and locations, in the form of new licenses, for providing their services. Utilities typically work closely with redevelopment authorities in the development of renewal projects;

they often provide new facilities and services as part of the redevelopment; they frequently acquire rights to install modernized facilities on new land acquired at federal expense; and indeed they often are a real beneficiary of any redevelopment. Any relocation and construction or installation cost to the utilities is then passed on to consumers through rates charged for the services.

A public utility does not suffer any real, let alone a disproportionate, injury. Under such circumstances, it would be incongruous to hold that a public utility should benefit from the Uniform Relocation Act at the considerable expense of the public.

II. THE LEGISLATIVE HISTORY OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT RELOCATION BENEFITS WERE NOT INTENDED TO BE PAID TO UTILITIES.

The Court of Appeals placed great weight on the "absence of any clear legislative

intent to exclude utilities", Chesapeake and Potomac Telephone Company of Virginia v. Landrieu, 674 F.2d 298, 301 (4th Cir. 1982), and relied in addition on Congress' failure to mention utilities and on its purported intent "to extend benefits uniformly to persons who are displaced by federal acquisitions." Id. To the contrary, however, the legislative history of and policy behind the Uniform Relocation Act indicate that utilities were not intended to be paid relocation benefits under the Act.

The legislative history of the Uniform Relocation Act demonstrates that Congress intended to extend a system of relocation assistance then being used under the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, §30, 82 Stat. 815, 830-834 (1968) (repealed 1971) and under the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 526 (1968) (repealed 1971) to all

other federal agencies. For example, in passing the Uniform Relocation Act, Congress explicitly recognized the Federal-Aid Highway Act of 1968 as a "major precedent". H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2, reprinted in [1970] U.S. Code Cong. & Ad. News 5850, 5851. In addition, Senator Muskie, the sponsor of the bill which became the Uniform Relocation Act, stated on the Senate floor:

> The problems created by the impact of such acquisitions have long been one of the Nation's top domestic burdens....Much of this problem will be covered by the present relocation and acquisition programs of HUD and the new programs authorized under the Highway Act of 1968. Yet, many other agencies and programs still lack consistency as well as identity with requirements of these programs.

115 Cong. Rec. 31534 (1969). Senator Mundt added the following remarks:

> The effort to provide additional compensation was recognized by Congress when it approved the urban renewal legislation and more recently in the Highway Act of 1968. Our bill seeks to carry the

> benefit of these two statutes to all Federal and federally assisted land acquisition to provide uniformity of policy so badly needed in this area.

115 Cong. Rec. 31534. (1969).

Thus, Congress modeled the Uniform Relocation Act on the programs of relocation benefits being used on federal highway projects and HUD projects as of 1970 which did not require payment of relocation benefits to utilities.

In unequivocal fashion, HUD's policy, quoted at p. 4 supra, has prohibited reimbursement of utility relocation costs except where required by state law or other applicable contractual or legal requirements. Nor does the benefit program under the Federal-Aid Highway Act of 1968 require relocation compensation for utilities but rather allows for reimbursement only where mandated by state laws. 23 U.S.C. §123 (1976).

In addition, one of the stated purposes of the Uniform Relocation Act was the achievement of a uniform policy for relocation assistance and real property acquisition. H.R. Rep. No. 1656, 91st Cong., 2nd Sess. 3, reprinted in [1970] U.S. Code Cong. & Ad. News 5850, 5851. It is significant, therefore, that Congress has not repealed the Federal-Aid Highway Act utilities relocation provision. See Uniform Relocation Act, uncodified §220, 84 Stat. 1903 (1971); Artesian Water Co. v. State, Department of Highways and Transportation, 330 A.2d 432 (Super. Ct. 1974), modified, 330 A.2d 441 (Del.).

Part of the legislative history of the Federal-Aid Highway Act of 1958 is particularly on point in this regard. At that time Congress considered "whether Federal-aid [highway] funds should be used to participate in the cost of relocating utility facilities where no vested property right is taken,"

Sen. Rep. No. 1407, 85th Cong., 2d Sess. 27-28, reprinted in [1958] U.S. Code Cong. & Ad. News 2382, 2382, and the impact of the Federal-Aid Highway Act of 1956 which authorized a federal share of up to 95 percent of the cost of relocating utility facilities. Many states responded by enacting statutes providing for payment of such costs. In adopting a provision limiting the federal share to 70 percent of relocation costs that the state is obligated to pay, the committee report stated:

> The committee did not contemplate this drastic change in existing practice when the 1956 act was enacted, and realizes that the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.

Id. at 2382-2383. Congress thus specifically recognized the long standing common law practice of states not compensating utilities, the special nature of relationships

between utilities and governmental utilities and the impact of changing the system of compensation.

Since the Federal-Aid Highway Act does not create a right to relocation benefits for utility companies, to maintain the desired uniformity, Congress must have intended that the Uniform Relocation Act also would not create such a right and that utilities displaced by all federal projects be treated similarly. The consequences of the Fourth Circuit's decision is the case at bar, insofar as it affects all federal projects and not just highway projects, far outweigh those feared by Congress in 1958.

In summary, Congress enacted the Uniform Relocation Act with two systems of relocation benefits in mind. Neither of these systems created a right to compensation under federal law for utility companies. Thus, the only reasonable conclusion from the legislative

history is that Congress did not intend to extend relocation compensation to utility companies by enacting the Uniform Relocation Act.

III. BY CONTRACT, UTILITIES ARE USUALLY REQUIRED TO RELOCATE THEIR FACILITIES FROM ONE PUBLIC STREET TO ANOTHER WITHOUT COMPENSATION.

The Fourth Circuit based its decision in part upon a holding that nothing in the legislative history of the Uniform Relocation Act indicates that Congress did not intend utilities to be treated as displaced persons eligible to receive relocation benefits or that the Act was not intended to create rights not recognized at common law. 674 F.2d at 300-301. In so holding, the Court ignored the fact that the relationship between a licensor-municipality and licensee-utility is generally in the nature of a contract under which the utility is responsible for all costs of relocating utility lines placed under public highways.

The granting to a public utility of the right to lay utility lines under public streets has generally been held to be subject to an implied obligation that the utility relocate its facilities at its own expense when necessary to make way for a proper governmental use of the street. Pacific Telephone and Telegraph Co. v. Redevelopment Agency, 87 Cal. App. 3d 296, 299, 151 Cal. Rptr. 68, 69 (Ct. App. 1978); Southern California Gas. Co. v. City of Los Angeles, 50 Cal. 2d 713, 716, 329 P.2d 289, 290 (1958). In many instances, this obligation is expressly set forth in the franchise itself.

Thus, contrary to the statement made by the Fourth Circuit that the situation of a public utility is like that of a tenant at will, the situation of a public utility is sui generis since the utility has an affirmative contractual obligation at common

law to pay the cost of relocating its utility lines that are located under public streets. As a matter of simple contract law, this obligation of a utility to the franchisor municipality continues in effect notwithstanding the provisions of the Uniform Relocation Act.[1] Absent a clear statement of Congressional intent to the contrary, it is

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1. Such an interpretation would violate the fundamental rule of statutory interpretation that wherever possible an interpretation that raises questions of Constitutional invalidity should be avoided. Crowell v. Benson, 285 U.S. 22 (1932). To interpret the Uniform Relocation Act as retroactively impairing the contractual relationships of thousands of municipalities and utilities would raise serious questions under the Contract Clause of the U.S. Constitution, see, e.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), as applied to the federal government by the Due Process Clause of the Fifth Amendment, Lynch v. United States, 292 U.S. 571 (1934).

improper to construe the Act as altering such established relationships.

The decision of the Fourth Circuit, if unaltered or not remanded for further consideration of the contractual issue, thus shatters a bedrock principle of municipal law as well as impairs fundamental contractual rights between municipalities and public utilities. It does so at the risk of grave economic harm to urban redevelopment.

CONCLUSION

For all the foregoing reasons, the Writ of Certiorari should be issued.

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